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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LAZARO WALDEMAR FLORES, Defendant and Appellant.	B232687 (Los Angeles County Super. Ct. No. GA076403)

APPPEAL from a judgment of the Superior Court of Los Angeles County. Teri Schwartz, Judge. Affirmed.

Waldemar D. Halka, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Lazaro Waldemar Flores (defendant) of one count of kidnapping to commit rape (Pen. Code, § 209, subd. (b)(1))[1] (count 1); three counts of forcible rape (§ 261, subd. (a)(2)) (counts 2-4); three counts of forcible sodomy (§ 286, subd. (c)(2)) (counts 5-7); three counts of forcible oral copulation (§ 288a, subd. (c)(2)) (counts 8-10); two counts of sexual penetration by a foreign object (§ 289, subd. (a)(1)) (counts 11-12); and one count of second degree robbery (§ 211) (count 13). With respect to counts 2 through 12, the jury found true the allegation that defendant kidnapped the victim and personally used a dangerous weapon (§ 667.61, subds. (a), (b), & (e)), and that defendant kidnapped the victim and the movement substantially increased the risk of harm (§ 667.61, subds. (a) & (d)). The jury also found true with respect to all counts that defendant personally used a deadly and dangerous weapon (a knife). (§ 12022, subd. (b)(1).)

The trial court sentenced defendant to state prison for a total term of 145 years to life. The sentence consisted of a sentence of life imprisonment in count 1, stayed pursuant to section 654; 25 years to life for each of counts 2, 3, and 4; the upper term of eight years for each of counts 5 through 12 with a one-year sentence imposed but stayed for each of the section 12022, subdivision (b) enhancements for these counts; and the upper term of five years with one year pursuant to section 12022, subdivision (b)(1) in count 13. All of the sentences were ordered to run consecutively.

Defendant appeals on the grounds that: (1) there was insufficient evidence to support the conviction of robbery in count 13; (2) the trial court erred in instructing the jury on the robbery count; (3) the trial court prejudicially erred by failing to instruct on attempted robbery; (4) the trial court erred in failing to instruct on unanimity for the robbery count; (5) cumulative error in the robbery count instructions requires reversal; (6) insufficient evidence supports the use of a deadly weapon finding in counts 2 through 12

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[1] All further references to statutes are to the Penal Code unless stated otherwise.

and the true findings in the allegations pursuant to section 667.61, which were based on personal use of a deadly weapon; (7) the true findings on the allegations of personal use of a deadly weapon in counts 2 through 12 must be reversed because the jury expressed a lack of understanding of the jury instructions, and the trial court failed to properly answer the jury's inquiries; (8) defense counsel rendered ineffective assistance; and (9) defendant's sentence constitutes cruel and unusual punishment.

FACTS

On the evening of April 1, 2009, K. W. left her place of employment in Los Angeles and boarded a bus to go home. At approximately 8:30 p.m., she got off the bus in a nearby city and crossed the street to wait for her connecting bus. While waiting, she sat on a bench and used her cell phone. After approximately five minutes, a man, whom she later identified as defendant, sat down in the middle of the bus bench. A few minutes later, defendant sat close to K. and grabbed her left hand while he put an extended pocket knife, with a blade measuring approximately four inches, against her left wrist. Defendant then said, "Give me cash." K. took her wallet out of her purse and handed it to defendant, believing he would then release her. She only had $2 or $3 and her identification in her wallet. When defendant saw this, he demanded ATM cards and credit cards. K. gave him her keychain that held two or three credit cards and her house keys. Defendant then demanded K.'s cell phone. K. gave it to him, believing he would kill her if she did not do as she was told. Defendant told K., "Don't scream, don't move. If you do scream or move, I will hurt you." K.'s mind went blank, and she was afraid of being killed.

Defendant told K. to stand up and said, "We will go" or "Let's go." Defendant forced her to walk at knifepoint past a Burger King and a motel to a vacant lot. As they walked, defendant kept telling her not to scream, move, or run away, or he would hurt her. He also told her not to tell her family, her husband, or the police, or he would kill her. Defendant took K.'s eyeglasses from her on the way to the vacant lot. K. suffered from nearsightedness and severe astigmatism.

At the vacant lot, there was an opening in the fence. Defendant crawled through it while still holding onto K.'s wrist. K. followed him through because defendant still had her wrist and she knew he had a knife somewhere. Also, defendant told her he would hurt her if she tried to get away, and she could not see well. Defendant forced her to walk to the middle of the vacant lot where there was a mattress, a blanket, and a sheet. It was dark and there were no nearby lights.

Defendant ordered K. to remove her clothing, but she did not do so because she knew he intended to rape her. Defendant then removed her clothing and undergarments. She was wearing a sanitary napkin because she was menstruating. K. began to cry and asked him not to do it. She told him she was married. She also told him she was menstruating.

Defendant did not listen to K. and took off his clothes. He told K. to lie down. When she did not do so, he pushed her down onto the mattress. Defendant kissed her on the neck, breasts, and mouth and she smelled alcohol on his breath. While defendant was doing this, he placed a finger inside her vagina and kept it there for three to four minutes. Defendant told K. not to cry and not to scream. She was crying because she knew she was going to be raped against her will, "but he was holding a knife against [her]." She knew that he would kill her if she did not follow his directions. He took his finger from her vagina and inserted his penis and began intercourse, which lasted for approximately 10 minutes. Next, defendant told K. to turn around and put her knees on the mattress. Defendant inserted his penis in her anus, which caused K. to cry and scream because it was very painful. K. told defendant not to do it, but he did not stop. Defendant told K. to turn around and lick his penis. When she refused, he pushed her down and forced her to orally copulate him until he ejaculated.

After defendant ejaculated, he rested for approximately five minutes. During this time defendant repeated that K. should not tell her family, her husband, or the police, or he would kill her. After the five-minute break, defendant repeated the sequence of sexual acts in the same order, i.e., the digital penetration, the rape, the sodomy, and the oral

copulation. While raping K., defendant asked her if she was enjoying it, and he said that his size was big. While this sequence of events took place, K.'s cell phone rang about 10 times.

Defendant took another break of about seven or eight minutes after the second series of sexual acts. K.'s cell phone kept ringing, and she told defendant to release her. She knew her husband was calling her. Defendant ordered K. to tell her husband the bus was delayed. He told her to say she would be home in 10 minutes. Defendant was grabbing K.'s wrist and he had a knife, so she had no choice but to do as she was told. After K. talked to her husband, defendant again ordered her not to tell anybody or he would kill everyone. He repeated this many times.

Defendant then pushed K. back down on the mattress and repeated the sequence of sexual attacks—the digital penetration, rape, sodomy, and oral copulation. The routine was exactly the same. There may have been a fourth sequence of sexual acts, but K. was not certain. While this was going on, K.'s cell phone kept ringing. Defendant ordered K. to tell her husband that she would be back in 10 minutes. Defendant asked K. if she enjoyed it and wanted to have more intercourse. She said, "No."

Defendant then said he was going to clean K.'s body and brought a bucket of water. While he was getting the water, K. thought about fleeing, but defendant had her identification, it was dark, and she did not have her glasses. She was afraid he would catch her and kill her. Defendant threw the water on K.'s genital area and then washed her body for two or three minutes. Defendant then washed his own body. ~(RT 111)~

Defendant told K. to get dressed. K. asked him for permission to get a clean sanitary pad from her purse because she knew he had the knife somewhere, and she felt that if she started to move without being told, he would kill or hurt her. When K. was dressed, defendant grabbed her wrist and told her there was another place he wanted to go. He took her through the gap in the fence and out to the intersection. She did not see the knife at that point. He led her to a market. K. believed defendant still had the knife with him while they were walking to the store. Defendant told her not to cry for help or

scream and to behave as if they were a couple. She let him pull her through the parking lot of the market. He made her walk three or four blocks in a residential area behind the market. She did not recall if defendant put the knife against her wrist again when they left the field.

Defendant eventually led K. back to the main boulevard and told her to sit at a bus stop. Defendant handed K. her driver's license and credit cards and told her to wipe away the fingerprints with her clothing. He did not return her glasses. Defendant then returned her key chain and told her to wipe the attached cards. While she was doing that he asked if she had more cash or an ATM card. Defendant returned K.'s cell phone. While K. was wiping the cards, defendant was typing something into his cell phone while holding her identification card. It appeared to K. that he was taking the information from the card and typing it into his phone. Defendant returned the identification card to K. and told her to wipe it. Defendant waited until a bus came. He returned K.'s glasses just before she got on the bus. K. then got a good look at defendant. Defendant waited until K. got on the bus, and he greeted the bus driver.

As soon as she was on the bus, K. called her husband. The call took place at 10:40 p.m., which was about two hours after she had gotten off the first bus. K.'s husband met her, and despite K.'s fears that defendant would go to her house and kill her and her husband, K.'s husband called the police. Sheriff's deputies met K. and her husband in a shopping area. K. told them what had happened to her. The deputies took her back to the vacant lot. In the lot, K. identified the mattress and bucket, but the blanket was gone.

After the attack was reported, an air unit reported a male running, and Sheriff's Deputy Kenelma Hernandez saw defendant coming out of a motel parking lot and running southbound. Deputy Hernandez followed defendant to a Burger King parking lot and detained him. Deputy Hernandez smelled alcohol on defendant's breath. Defendant said he ran from the helicopter because he had been drinking beers and got scared.

K. was asked to identify someone. On that night, she said she was 70 to 80 percent sure the man she identified (defendant) was her attacker. After identifying defendant, K. was taken to a hospital.

Sexual assault examiner Nune Abraamyan conducted K.'s sexual assault examination at approximately 2:00 a.m. K. was cooperative but looked upset and nervous. It was significant that K. was on her period because the blood washes away a lot of evidence. After the assault, K. had used the restroom, which could have also destroyed evidence. She had not showered. K. described the acts that had occurred. Abraamyan noted that K. had bruising on her legs below her knees, and these bruises appeared to be fresh.

Using a colposcope for magnification, Nurse Abraamyan observed a laceration to the posterior fourchette, where the labias meet at the bottom. There were lacerations and bruising in K.'s anal region from penetration. Using a speculum, Nurse Abraamyan observed injuries on the cervix at 3:00 and 7:00, which would be caused by force trauma such as penile penetration, rather than by the insertion of a tampon. Using the colposcope on the anal area, Nurse Abraamyan observed anal lacerations at 3:00, 4:00, and 5:00 and a bruise between 2:00 and 3:00. Such lacerations would be caused by penetration from the outside, not by a difficult bowel movement. The bruising would be caused by force or pressure from a penetration-type injury. Swabs were taken from the external genital areas, internal vaginal area, the mouth, and other areas. K.'s clothing was also collected for analysis.

Abraamyan examined defendant at 5:00 a.m. on April 2, 2009. She noted that he smelled of alcohol. He wore dirty, raggedy clothing. Abraamyan noted no scratch marks on his body. Defendant's hands, genitalia, and mouth were swabbed, and his pubic hair was collected.

Criminalist Gregory Hadinoto analyzed the evidence collected from the sexual assault examinations. Hadinoto detected saliva on the swab samples collected from K.'s left breast, cheek, and neck. Amylase, the protein found in saliva, was also weakly

detected on the external genital sample, but that could be caused by perspiration, urine, vaginal secretions, and seminal fluid. Semen was detected in the oral sample. The samples that tested positive for saliva and semen were forwarded for DNA testing.

The criminalist also tested the swabs taken from defendant. Amalyse was detected on the swabs taken from the head of the penis, the shaft of the penis, and the testes. Those samples were set aside for DNA testing. An oral reference sample was also taken from K.'s husband so that he could be excluded from the DNA results. None of his DNA was detected in the tested samples.

Senior Criminalist George Hou performed the DNA analysis on the samples taken in this case. The samples taken from K.'s right and left breasts contained a major profile which matched defendant's DNA profile. A mixture of defendant's DNA profile and K.'s DNA profile were found in K.'s cheek and neck samples. The sample taken from the shaft of defendant's penis included DNA from both defendant and K. Hou determined that the breast samples contained DNA that only one person out of 88 quintillion would have. There was a frequency of one in 539 million for the cheek and neck samples and one in 219 million for the shaft sample.

Sheriff's Detective Sherry Gibson went to the vacant lot where the assault had occurred. It was apparent that a lot of transients had taken up residence there. There were mattresses and trash throughout.

Defendant presented no evidence in his defense.

DISCUSSION

I. Sufficiency of Evidence of Robbery

A. Defendant's Argument

Defendant contends there was no evidence that he took any of K.'s property with the requisite intent to permanently deprive her of it. Although there was evidence defendant obtained several items of the victim's property, there was also evidence that he later returned all of the property to her. Therefore, defendant argues, reversal of the

robbery conviction and the accompanying true finding on the personal knife-use allegation is required.

B. Relevant Authority

When the sufficiency of the evidence is challenged, we review the entire record in the light most favorable to the judgment to determine if it contains substantial evidence—i.e., evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Solomon* (2010) 49 Cal.4th 792, 811.) This standard of review is applied when determining the sufficiency of the evidence to support a conviction or a special circumstance allegation. (*People v. Maury* (2003) 30 Cal.4th 342, 396.) It is also applied regardless of whether the People rely primarily on direct or circumstantial evidence. (*Solomon*, at p. 811.) We presume in support of the judgment the existence of any fact the jury reasonably could have deduced from the evidence. (*People v. Davis* (1995) 10 Cal.4th 463, 509.) Thus, we must accept logical inferences that the jury could have drawn even if we would have reached a contrary conclusion. (*Solomon*, at pp. 811-812.)

The elements of robbery are: (1) the taking of personal property, (2) from the person or immediate presence of another, (3) by means of force or fear, (4) with the intent to permanently deprive the owner of the property. (*People v. Lopez* (2003) 31 Cal.4th 1051, 1058; *In re Travis W.* (2003) 107 Cal.App.4th 368, 373; § 211.) "[T]he intent required for robbery . . . is seldom established with direct evidence but instead is usually inferred from all the facts and circumstances surrounding the crime. [Citations.]" (*People v. Lewis* (2001) 25 Cal.4th 610, 643.)

"The intent to steal . . . is the intent, without a good faith claim of right, to permanently deprive the owner of possession." (*People v. Davis* (1998) 19 Cal.4th 301, 305.) However, "[t]he reference to the intent to permanently deprive is merely a shorthand way of describing the common law [intent] requirement and is not intended literally." (*People v. Avery* (2002) 27 Cal.4th 49, 55.) Instead, the intent to steal can be satisfied by the "intent to take the property only temporarily, but for so extended a period

of time as to deprive the owner of a major portion of its value or enjoyment." (*Id*. at p. 52.) Similarly, the intent element can be satisfied by an intent to "deprive an owner of the main value of his property." (*People v. Zangari* (2001) 89 Cal.App.4th 1436, 1443.) The loss of value need not be definitely contemplated by the thief in order to satisfy this element. Intent to steal is proven if the thief intends to use the property in such a way that the owner will probably be deprived of his property, or if there is a substantial risk of permanent loss. (*People v. Mumm* (2002) 98 Cal.App.4th 812, 819; *People v. Avery*, at p. 56; *People v. Zangari,* at p. 1446.)

C. Evidence Sufficient

"The specific intent with which an act is performed is a question of fact." (*In re Albert A.* (1996) 47 Cal.App.4th 1004, 1008; see also *People v. DeLeon* (1982) 138 Cal.App.3d 602, 606 (*DeLeon*).) If there is any substantial evidence that supports the trier of fact's finding on the specific intent issue, we will not disturb it. (*DeLeon*, at p. 606.) A jury may infer a defendant's specific intent to commit a crime from the facts and circumstances shown by the evidence. (*People v. Lindberg* (2008) 45 Cal.4th 1, 27; *People v. Bloom* (1989) 48 Cal.3d 1194, 1208 ["Evidence of a defendant's state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence to support a conviction"].)

At issue is defendant's intent at the time he took the property, not defendant's intent at the time the property was subsequently returned. Intent is to be inferred from the circumstances at the time of the taking. (See *DeLeon, supra,* 138 Cal.App.3d at p. 606; see also *People v. DePriest* (2007) 42 Cal.4th 1, 46 ["robbery requires an intent to steal the property at the time the accused took it"].)

In *DeLeon*, the appellants took a car and subsequently abandoned it. The court held that a robbery conviction could be sustained for the taking of the car. Merely because the car was abandoned did not compel the conclusion that appellants intended to deprive the owner of the car only temporarily. The jury might reasonably have concluded that appellants intended to permanently deprive the owner of the car but

changed their minds when they discovered valuable coins inside and feared they might face more serious charges. "Giving all reasonable inferences in favor of the judgment," the *DeLeon* court found that substantial evidence supported a conviction of robbery for taking the car by force. (*DeLeon*, *supra*, 138 Cal.App.3d at p. 606.)

In the instant case, as well, the jury believed defendant intended to permanently deprive K. of her property, and, as in *DeLeon*, this was a reasonable conclusion. The fact that K.'s belongings were returned at the end of her ordeal did not make it unreasonable for the jury to conclude that defendant had no intent to return the items when he took them, and that it was only upon his having committed the atrocious sex crimes that he thought better of keeping the items and using those that might offer a financial benefit. (See *People v. Avery*, *supra*, 27 Cal.4th at p. 55.) It is not a reasonable interpretation of the evidence that defendant only wanted to borrow K.'s property and then return it after he had raped her. The fact that defendant was holding her property was not an incentive for K. to follow him or submit to him. If she could have, she would have run a mile and given up the items defendant took. That defendant discovered the victim had nothing in her possession worth keeping and abandoned the effort does not negate the strong circumstantial evidence of intent. (See *People v. Hill* (1998) 17 Cal.4th 800, 852; *People v. Carroll* (1970) 1 Cal.3d 581, 584; *DeLeon*, *supra*, 138 Cal.App.3d at p. 606.) The evidence was sufficient to find that defendant intended to permanently deprive K. of her property at the time that he took it by means of inducing fear.

It is true that the prosecutor argued the deprivation of enjoyment aspect of the robbery. She also argued, however, that defendant had robbed K. of her wallet, her few dollars, her debit and credit cards, her identification, her cell phone and her glasses. Thus, the prosecutor by no means conceded the issue of the intent to permanently deprive. In any event, the evidence was also sufficient for the jury to reasonably conclude that defendant intended to permanently deprive K. of a major portion of the value or enjoyment of her property. Defendant took K.'s cell phone and glasses, items whose removal from her possession made her completely at defendant's mercy.

"Giving all reasonable inferences in favor of the judgment," we conclude that the evidence was sufficient to satisfy the required intent element of robbery. (*DeLeon, supra*, 138 Cal.App.3d at p. 606.) Appellant's arguments are without merit.

II. Jury Instruction on Robbery

A. Defendant's Argument

Defendant contends that, in reading CALCRIM No. 1600,[2] the trial court gave an instruction on the robbery count that was both erroneous and unsupported by substantial evidence. He argues that, as a result, it is impossible to determine whether the jury convicted defendant of second degree robbery based on a legally correct theory.

B. Relevant Authority

"[W]hen the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot

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[2] CALCRIM No. 1600 was read as follows: "The defendant is charged in count 13 with robbery in violation of Penal Code section 211. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] One, the defendant took property that was not his own; [¶] Two, that property was taken from another person's possession and immediate presence; [¶] Three, the property was taken against the person's will; [¶] Four, the defendant used force or fear to take the property or to prevent the person from resisting; [¶] And, five, when the defendant used force or fear to take the property, he intended to deprive the owner of it permanently or to remove it from the owner's possession for so extended a period of time, that the owner would be deprived of a major portion of the value or enjoyment of the property. [¶] The defendant's intent to take the property must have been formed before or during the time he used force or fear. [¶] If the defendant did not form this required intent until after using the force or fear, then he did not commit robbery. [¶] If you find that the defendant is guilty of robbery, it is robbery of the second degree. [¶] A person takes something when he or she gains possession of it and moves it some distance. The distance may be short. The property taken can be of any value, however slight. Two or more people may possess something at the same time. [¶] A person does not have to actually hold or touch something to possess it. It is enough if the person has control over it, the right to control it, either personally or through another person. [¶] Fear as used here means fear of injury to the person herself or injury to the person's family or property. [¶] Property is within the person's immediate presence if it is sufficiently within his or her physical control that he or she could keep possession of it if not prevented by force or fear."

determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand." (*People v. Green* (1980) 27 Cal.3d 1, 69 (*Green*), disapproved of on other points in *People v. Martinez* (1999) 20 Cal.4th 225, 233-237 & *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3.) The court in *Griffin v. United States* (1991) 502 U.S. 46 held that, although error based upon an incorrect *legal* theory required reversal, *factual* error did not if another valid basis for conviction existed. (*Id*. at pp. 59-60.) *People v. Guiton* (1993) 4 Cal.4th 1116 (*Guiton*) harmonized *Green* and *Griffin* by observing that *Griffin* had distinguished between those cases in which a particular theory of conviction is legally inadequate and those in which the jury has been left the option of relying upon a factually inadequate theory that suffered from an insufficiency of proof. The former type of case is subject to the rule generally requiring reversal; the latter type does not require reversal if at least one valid theory remains. (*Guiton*, at p. 1128.)

Guiton stated that "[t]rial courts have the duty to screen out invalid theories of conviction, either by appropriate instruction or by not presenting them to the jury in the first place." (*Guiton, supra*, 4 Cal.4th at p. 1131.) When a jury is instructed on multiple theories, one of which is factually inadequate, "reversal is not required whenever a valid ground for the verdict remains, absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground." (*Id*. at p. 1129.) When there is a general verdict in a case involving more than one factual theory, a reviewing court "will presume, unless the record shows otherwise, the jury acted properly and relied on a supported theory. [Citation.]" (*People v. Lucas* (1997) 55 Cal.App.4th 721, 733-734.)

C. No Error

Respondent argues that defendant has forfeited this argument by failing to object to the reading of the instruction below. Defendant counters that his substantial rights were affected, and the trial court had a duty to not instruct on principles of law irrelevant to the issues raised by the evidence. Defendant's failure to either object to the proposed instruction or request clarifying language forfeits his claim on appeal. (*People v. Valdez* (2004) 32 Cal.4th 73, 113.) His claim also fails on the merits.

Because we have determined that there was sufficient evidence of intent to permanently deprive, the instruction as given was entirely proper. As stated previously, the circumstantial evidence of the manner of taking K.'s property would lead a reasonable jury to conclude that defendant had no intention of returning the property at the time he took it at knifepoint. In addition, as we have determined, defendant deprived K. of a major portion of the value of her property for a critical length of time. The length of time the defendant withholds the property is but one factor to consider in determining the ultimate question as to whether the withholding deprived the victim of the substantial value or enjoyment of the property. In the instant case, it was sufficient.

Moreover, unlike defendant, we do not view the two parts of the instruction as presenting two different legal theories, but merely two aspects of the same legal theory—that defendant stole from K. by means of force and fear. He merely stole something intangible as well as tangible items—not one or the other. Defendant's argument based on *Guiton* is without merit. The jury was not presented with an invalid legal theory in CALCRIM No. 1600.

Finally, because substantial evidence supports the jury's verdict, any instructional error which may have occurred was not prejudicial. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see *People v. Breverman* (1998) 19 Cal.4th 142, 165 (*Breverman*).)

III. Lack of Attempted Robbery Instruction

A. Defendant's Argument

Defendant contends that a reasonable juror could have concluded, based on the evidence, that defendant attempted to rob K. of money, but that his temporary taking of her other personal property was not accompanied by the requisite specific intent. Because the trial court failed to give sua sponte an instruction on attempted robbery, reversal is required. The prosecutor should be given the option of retrying the greater offense or accepting a reduction to the lesser offense.

B. Relevant Authority

"[A] trial court errs if it fails to instruct, sua sponte, on all theories of a lesser included offense which find substantial support in the evidence. On the other hand, the court is not obliged to instruct on theories that have no such evidentiary support." (*Breverman*, *supra*, 19 Cal.4th at p. 162.) "[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury." (*Ibid.*)

An appellate court "appl[ies] the independent or de novo standard of review to the failure by the trial court to instruct on an assertedly lesser included offense." (*People v. Cole* (2004) 33 Cal.4th 1158, 1218.) The crime of attempt occurs when there is a specific intent to commit a crime and a direct but ineffectual act done towards its commission. (§ 21a.) Attempted robbery is considered a lesser included offense of robbery. (*People v. Calpito* (1970) 9 Cal.App.3d 212, 220.)

C. No Error

Once defendant used force or fear to obtain possession of K.'s property with the requisite intent, a completed robbery occurred. Defendant's return of the stolen property after he used force or fear to obtain it did not extinguish the completed robbery or convert the robbery into an attempted robbery. There was no evidence that defendant took a direct but *ineffectual* act toward the commission of a robbery, and thus no instruction on attempted robbery was required. (*People v. Medina* (2007) 41 Cal.4th 685, 694; see *Breverman*, *supra*, 19 Cal.4th at p. 162 ["On the other hand, the court is not obliged to instruct on theories that have no such evidentiary support"].) Defendant successfully completed a robbery—he merely changed his mind about keeping the property.

We also conclude that, even if the failure to instruct on attempted robbery constituted error, defendant was not prejudiced thereby. It is not reasonably probable that a result more favorable to defendant would have resulted in the absence of the alleged error. (*People v. Prince* (2007) Cal.4th 1179, 1267; *Breverman*, *supra*, 19 Cal.4th at

p. 178.) Reasonable jury members would have found that all of the elements of a completed robbery were present, and they did so.

IV. Lack of Unanimity Instruction

A. Defendant's Argument

Defendant contends the trial court prejudicially erred when it failed to instruct on jury unanimity with respect to the robbery count. Defendant argues that the error violated his constitutional right to a unanimous jury and may have lessened the prosecution's burden of proof.

B. Relevant Authority

A jury verdict must be unanimous in a criminal case. If the accusatory pleading charges a single offense, and the evidence shows the defendant committed more than one act that could constitute that offense, the jury must be instructed that the defendant can be found guilty only if the jurors unanimously agree the defendant committed the same, specific act comprising the crime. This requirement is intended to eliminate the danger that the defendant will be convicted even though there is no single offense that all jurors agree he or she committed. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132 (*Russo*).) A unanimity instruction typically applies to acts that could have been charged as separate offenses. (*People v. Edwards* (1991) 54 Cal.3d 787, 824.)

"In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction." (*Russo*, *supra*, 25 Cal.4th at p. 1135.) Where required, a unanimity instruction must be given sua sponte. (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 274-275.)

A unanimity instruction is not required when the acts alleged are so closely connected as to form part of one continuing transaction or course of criminal conduct. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 100; *People v. Dieguez*, *supra*, 89

Cal.App.4th at p. 275.) This "continuous course of conduct" exception applies when (1) the defendant's acts are so closely connected that they form part of the same transaction and thus of the same offense, or (2) the statute implies a continuous course of conduct of a series of acts over a period of time. (*People v. Jenkins* (1994) 29 Cal.App.4th 287, 299; *People v. Avina* (1993) 14 Cal.App.4th 1303, 1309.) The continuous conduct rule also applies when a defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for jurors to distinguish between them. (*People v. Stankewitz*, at p. 100.)

Assuming a unanimity instruction was required to be given, it is settled that failure to give the instruction is '"harmless when disagreement by the jury is not reasonably probable."' (*People v. Jenkins*, *supra*, 29 Cal.App.4th at p. 299.)

C. No Error

We conclude that a unanimity instruction was not required for the robbery count in this case. Defendant told K. to hand over her possessions one by one, in succession. There was no amount of time that he left K. and came back to demand more property. As we have determined, there was sufficient circumstantial evidence of his intent to permanently deprive K. of her valuables, and there was also sufficient evidence that he intended to deprive her of the major part of the value of some items. The taking of all the items of property was so closely connected so as to constitute one transaction.

In *People v. Riel* (2000) 22 Cal.4th 1153, 1199-1200, the California Supreme Court held that where the parties never distinguished between two acts of robbery and the defense was the same as to both, the trial court was not obliged to give a unanimity instruction. (*Id*. at p. 1199.) In that case, an accomplice testified that while he waited in his car, the appellant and a third person held up a truck stop and kidnapped the clerk. He said that appellant robbed the clerk of his wallet during the ride to the place where the clerk was murdered. (*Id*. at pp. 1172-1173.) The appellant claimed he was asleep in the car when all the crimes were committed. (*Id*. at p. 1199.) The court stated that there was no danger some jurors would find that the appellant committed the truck stop robbery but

not the one in the car, while others would find he committed the robbery in the car but not the one at the truck stop. (*Ibid*.) The jury's verdict clearly implied it did not believe the only defense offered. (*Id*. at p. 1200.)

Defendant also offered the same defense to the acts that he now attempts to categorize as separate acts, i.e., that he was intoxicated. (See *Stankewitz, supra,* 51 Cal.3d at p. 100.) "'A unanimity instruction is required only if the jurors could otherwise disagree which act a defendant committed and yet convict him of the crime charged.' [Citations.] '[W]here the acts were substantially identical in nature, so that any juror believing one act took place would inexorably believe all acts took place, the instruction is not necessary to the jury's understanding of the case.' [Citations.]" (*People v. Beardslee* (1991) 53 Cal.3d 68, 93.) We conclude defendant committed one continuous act of robbery, and his argument is without merit.

Moreover, there can be no doubt that the jury would have reached the same result even if it had been given a unanimity instruction, since there was no risk the jurors would not believe that one allegedly separate act of robbery took place and not "'inexorably believe'" both acts of robbery took place. (*People v. Beardslee, supra,* 53 Cal.3d at p. 93.) Therefore, even if we were to conclude the unanimity instruction should have been given, we would find the failure to do so harmless under any standard. (*Chapman v. California* (1996) 386 U.S. 18, 24; *People v. Watson, supra*, 46 Cal.2d at p. 836.)

V. Cumulative Errors Affecting Robbery Count

A. Defendant's Argument

Defendant contends that, even if the errors in his first four issues are deemed harmless individually, their cumulative effect combined to irreparably prejudice his constitutional right to a fair trial on the robbery count. In examining cumulative error, the critical question is "whether defendant received due process and a fair trial." (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 349; accord, *People v. Cain* (1995) 10 Cal.4th 1, 82 [a defendant is entitled to a fair trial, not a perfect one].)

A predicate to a claim of cumulative error is a finding of error. Here, we have found no error. Our review of the record assures us that in defendant's case neither the process nor the result were detrimentally affected by error. (See *People v. Ashmus* (1991) 54 Cal.3d 932, 1006.)

VI. Evidence Supporting Personal Use of Dangerous or Deadly Weapon

A. Defendant's Arguments

Defendant contends that there was not sufficient evidence of defendant's personal use of a dangerous or deadly weapon in the commission of the sex offenses. The location of the knife at the time of the sexual offenses is completely unknown. There is no evidence defendant had the knife with him after he and K. crossed the fence into the vacant lot. Also, there is no evidence of any use of the knife after the sex crimes, while defendant maintained control of K. According to defendant, the true findings on the section 12022, subdivision (b)(1) allegations and on the personal knife-use allegations under section 667.61 must be reversed, and the case must be remanded for resentencing.

B. Relevant Authority

The prosecution has the burden of proving each element of a sentence enhancement beyond a reasonable doubt. (*People v. Tenner* (1993) 6 Cal.4th 559, 566.) The standard of review in a case involving the sufficiency of evidence of an enhancement allegation is to "review the record in the light most favorable to the judgment [citation] to determine whether substantial evidence supports the fact finder's conclusion, i.e., whether a reasonable trier of fact could have found that the prosecution had sustained its burden of proving the defendant guilty beyond a reasonable doubt. [Citation.]" (*Id*. at p. 567.)

"Use" of a weapon means, inter alia, """to carry out a purpose or action by means of,""" and to """make instrumental to an end or process.""" (*People v. Bland* (1995) 10 Cal.4th 991, 997.)

C. Evidence Sufficient

We disagree with defendant and conclude that the evidence was sufficient to find that he personally used a dangerous or deadly weapon in the commission of the sex offenses. As a result, there is also sufficient evidence to support the true findings on the personal knife-use allegations under section 667.61.

In *People v. Turner*, for example, the appellant brandished a gun and forced the victim into her car as she opened the car door. (*People v. Turner* (1983) 145 Cal.App.3d 658, 668, disapproved on other points in *People v. Newman* (1999) 21 Cal.4th 413, 415, & *People v. Majors* (1998) 18 Cal.4th 385, 411.) He then walked around the car, got inside, and placed the gun between the seats. He ordered the victim to drive to a secluded spot where, after placing the gun on the floor, he committed forced oral copulation and rape. The victim eventually escaped. (*Turner*, *supra*, at pp. 668, 684-685.) In affirming the appellant's firearm use allegations, the court stated that the gun appellant used was an essential part of the crimes he committed. (*Id*. at p. 684.) He first displayed it and then had it available for use at all times. (*Ibid*.) The victim described her fear on the stand. (*Id*. at p. 685.) The court stated, "[w]here the victim is sufficiently frightened by the use of a weapon such that it becomes unnecessary to continually display the weapon during the course of later crimes against that victim within a brief span of time, a use finding . . . is proper." (*Ibid*.) Likewise in the instant case, defendant's use of the knife at the beginning was sufficiently frightening to K. such that it was unnecessary to continually produce it in order to sustain a use finding. Although the span of time was not brief, defendant continually reinforced the fear he induced with his initial display of the weapon by threatening K. and her family.

In *People v. Jackson* (1980) 110 Cal.App.3d 560, the victim was asleep when she was awakened and saw the appellant standing over her while holding an 18-inch pair of scissors. (*Id*. at p. 564.) Appellant and the victim moved to another room where he undressed her and forced her to perform oral copulation and sexual intercourse. (*Ibid*.) The victim testified that, during the sexual acts, the scissors were in appellant's pants that

were lying on the floor. When the police arrived, they found the scissors in the medicine cabinet in the bathroom where they were normally kept. (*Id*. at p. 568.) The court held that the victim's testimony that she complied with the demands because she was afraid for her safety and continued to be afraid was a sufficient basis for the jury to find beyond a reasonable doubt that appellant used a deadly weapon. (*Id*. at p. 569.) Other cases have reached similar results. (See, e.g. *People v. Wilson* (2008) 44 Cal.4th 758, 772, 807 [when appellant kidnapped rape victim and her family at gunpoint and made continual threats, his enhancement for gun use during the rape upheld although he raped victim in a car with no weapon present]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1007 [jury could reasonably conclude that the control and fear created by appellant's initial firearm display continued throughout the encounter and engendered a continuing state of helplessness, thus establishing his use of the gun as an aid in completing an essential element of the crimes of rape and sodomy]; *People v. Camacho* (1993) 19 Cal.App.4th 1737, 1741, 1747-1748 [appellants properly found to have used their weapons during rapes even though guns were not continually displayed when they forced victim into limousine by displaying guns and threatening to kill her].)

Here, K. testified that defendant grabbed her left hand and placed a four-inch knife against her wrist. K. complied with all his orders to give up her property because she believed he would kill her if she did not do as she was told. Defendant told K., "Don't scream, don't move. If you do scream or move, I will hurt you." K.'s mind went blank, and she was afraid of being killed. Defendant forced her to walk at knifepoint past a Burger King and a motel to a vacant lot. As they walked, defendant kept telling her not to scream, move, or run away, or he would hurt her. He also told her not to tell her family, her husband, or the police, or he would kill her. K. testified that she followed defendant through the fence because he still had her wrist and she knew he had a knife somewhere. Also, defendant told her he would hurt her if she tried to get away. During the sexual acts defendant continually told K. not to cry and not to scream. She was crying because she knew she was going to be raped against her will, "but he was holding

a knife against [her]." She testified that she knew that he would kill her if she did not follow his directions. During his rest periods, defendant repeated that K. should not tell her family, her husband, or the police, or he would kill her. Defendant forced K. to speak with her husband on her cell phone and say the bus was delayed, and she obeyed because he was grabbing her wrist and he had a knife. She believed she had no choice but to do as she was told. After K. talked to her husband, defendant again told her not to tell anybody or he would kill everyone. He repeated this many times. She did not run away when he went to get water because she was afraid defendant would catch her and kill her. K. even asked for permission to reach into her purse because she knew defendant had the knife somewhere, and she felt that if she started to move without being told, he would kill or hurt her. K. believed defendant still had the knife with him while they walked to the store after the sex crimes. Defendant again told her not to cry for help or scream.

Thus, defendant's initial display of the weapon and his continual threats to K. show that he used the knife as an aid in committing an essential element of the sex crimes, "i.e., that he accomplished these acts against [the victim's] will 'by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury' on the victim or another person. [Citation.]" (*People v. Masbruch*, *supra*, 13 Cal.4th at p. 1011.) There was sufficient evidence for the jury to find that defendant used a dangerous or deadly weapon in committing the offenses in counts 2 through 12.

VII. Jury's Queries Regarding Instructions on Weapon-Use Allegations

A. Defendant's Arguments

Defendant contends the jury showed it did not understand the weapon-use allegations, and the trial court failed to properly respond to the jury's questions. It ultimately gave a special instruction that was misleading and inadequate. The error deprived defendant of his constitutional rights to have the jury determine every material issue presented by the evidence. According to defendant, the trial court's error cannot be deemed harmless in a close case such as this one. The true findings must be reversed, and the matter remanded for resentencing.

B. Proceedings Below

Jury deliberations began at the end of the day on March 23, 2011. On March 24, 2011, just before noon, the jurors sent a note to the trial court that read as follows: "Is it possible to find a guilty verdict and have subsections found to be not true? i.e. count 1. Can we find guilty but not true as to weapon? And can there be a less than 12/0 vote on true, not true?" The trial court and the parties agreed that the answer was "yes" to the first question, "yes" to the second, and "no" to the third. On the morning of the following day, the jury asked for read back of all testimony and closing arguments regarding the knife. The trial court allowed the former but not the latter, since argument is not evidence. That afternoon (March 25, 2011), the jury wrote a note indicating they had reached verdicts on all counts and unanimous findings on the first special allegation (that defendant had kidnapped the victim and personally used a dangerous/deadly weapon within the meaning of section 667.61, subdivisions (a), (b), and (e)) in all counts. The jury had also reached unanimous findings on the second special allegation (that defendant kidnapped the victim and the movement substantially increased the risk of harm within the meaning of section 667.61, subdivisions (a) and (d)) in counts 2 through 12. The jury said it was at an impasse on the third special allegation (that defendant had, in the commission of the offense, personally used a dangerous/deadly weapon pursuant to section 12022, subdivision (b)) in counts 2 through 12.

When each juror was asked individually whether there was anything the court could do to assist, such as give further instruction, read back, argument, or anything similar, each juror answered in the affirmative. The trial court asked the jury to return to the deliberation room and decide what might be of further help. Shortly thereafter, the jury sent out another note asking, "Does personal use of a weapon mean that the defendant must be holding the weapon in his hand during the commission of the offense?"

The trial court, the prosecutor, and defense counsel discussed at length the best manner in which to answer the jury's query. The trial court pointed out that the jury's

question was not susceptible of a "yes" or "no" answer, which would amount to directing the jury's finding on the issue. After hearing further argument, the trial court proposed reading an instruction based on language from *People v. Jones* (2001) 25 Cal.4th 98 (*Jones*). The proceedings were recessed for counsel to study the trial court's suggestion. On the following day, the trial court presented counsel with a definitive suggestion based on *Jones*. Defense counsel and the prosecutor agreed that the court should send its suggested instruction to the jury.

The instruction read as follows: "The People must prove beyond a reasonable doubt that the defendant personally used a deadly weapon during the commission of the crimes charged. The People are not required to prove that the defendant held the weapon in his hand during the entire commission of all of the crimes charged. It is sufficient if the People prove the defendant held the weapon before or during the commission of an offense if the weapon was used to threaten or maintain control over the victim." (See *Jones*, *supra*, 25 Cal.4th at p. 110.) The instruction was given to the jury at 9:16 a.m., and the verdicts were returned at 9:23 a.m.

C. Relevant Authority

The trial court has a primary duty to help the jury understand the legal principles it is asked to apply. (*People v. Thompkins* (1987) 195 Cal.App.3d 244, 250.) The trial judge is not obligated to repeat the words chosen by the CALJIC committee, however helpful they may be. (*People v. Runnion* (1994) 30 Cal.App.4th 852, 858.) "[The trial court] should decide as to each jury question whether further explanation is desirable, or whether it should merely reiterate the instructions already given." (*People v. Beardslee*, *supra*, 53 Cal.3d at p. 97.)

"In reviewing a claim of error in jury instructions in a criminal case, this court must first consider the jury instructions as a whole to determine whether error has been committed. [Citations.] We may not judge a single jury instruction in artificial isolation, but must view it in the context of the charge and the entire trial record. [Citation.]" (*People v. Moore* (1996) 44 Cal.App.4th 1323, 1330-1331.)

D. No Error or Constitutional Violation

We first observe that any claim of error has been forfeited for failure to object below. (See *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1193.) In any event, defendant's arguments have no merit.

Defendant's specific complaint about the trial court's special instruction is that it did not tell the jury there had to be a nexus between the knife display and defendant's subsequent commission of the sex offenses to which the allegations were attached. Defendant cites authority for the proposition that the weapon use must aid the defendant in completing one of the essential elements of the crime. (See, e.g., *People v. Masbruch*, *supra*, 13 Cal.4th at p. 1012; *People v. Lerma* (1996) 42 Cal.App.4th 1221, 1226.) Secondly, according to defendant, the trial court should have told the jury that the term "use" requires something more than being armed.

We disagree with defendant's assertions. The special instruction, combined with CALCRIM No. 3145, did inform the jury that there needed to be a "nexus" between the display of the weapon and the subsequent crimes. As noted, CALCRIM No. 3145 informed the jury that defendant personally *used* a deadly or dangerous weapon if he "display[ed] the weapon in a menacing manner." The additional instruction merely informed the jury that the People did not have to prove that defendant "held the weapon in his hand during the entire commission of all of the crimes," which is an accurate statement of the law. Likewise, the special instruction's statement that the People had only to prove that the defendant held the weapon prior to the commission of all the crimes *or* during their commission if the "weapon was used to threaten or maintain control over the victim" was an accurate statement of the law. The *Jones* case, on which the trial court relied for its instruction, stated that "[i]n the case of a weapons-use enhancement, such use may be deemed to occur 'in the commission of' the offense if it occurred *before, during, or after* the technical completion of the felonious sex act. The operative question is whether the sex offense posed a greater threat of harm—i.e., was

more culpable—because the defendant used a deadly weapon to threaten or maintain control over his victim." (*Jones, supra,* 25 Cal.4th at pp. 109-110.)

There is no question that defendant used the knife to threaten K. before he committed the sex offenses and thus to maintain control over her as he carried out the various offenses. The trial court did not err by telling the jury that the People did not have to prove that defendant was not holding the knife in his hand as he raped, sodomized, and ordered the forced copulation, since this is a correct statement of the law. It is beyond question that defendant's display of the knife to K. and his touching her wrist with it aided him in perpetrating the sex offenses.

Finally, the trial court did not prejudicially err in failing to inform the jurors that the term "use" requires something more than being armed. In this case, defendant clearly used the knife to commit all of the charged crimes, and the trial court was not obliged to give an instruction that did not apply to the facts of the case. It is error for a trial court to give an instruction on a principle of law that, although correct, has no basis in the facts of the case, thus making it irrelevant and potentially confusing to the jury. (*People v. Saddler* (1979) 24 Cal.3d 671, 681; *People v. Hesslink* (1985) 167 Cal.App.3d 781, 792.)

We believe the trial court adequately answered the jury query, and defendant suffered no prejudice from its considered response.

VIII. Ineffective Assistance of Counsel

A. Defendant's Argument

Defendant contends that, once the jury expressed its lack of understanding in the weapon-use allegations, his counsel was obliged to ensure that the trial court fully and properly instructed the jury on the principles of personal use of a weapon, which counsel failed to do. Counsel's omissions deprived defendant of a fair trial and his right to have the jury determine every material issue presented by the evidence. Defendant asserts it is reasonably probable he would have obtained a different result absent counsel's ineffective assistance.

B. Relevant Authority

A criminal defendant has a state and federal constitutional right to the effective assistance of counsel. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; *Strickland v. Washington* (1984) 466 U.S. 668, 685-686; *People v. Pope* (1979) 23 Cal.3d 412, 422-423.) When claiming ineffective assistance of counsel, a defendant has the burden of establishing by a preponderance of the evidence that: (1) trial counsel's performance fell below prevailing professional standards of reasonableness; and (2) there is a reasonable probability that but for counsel's unprofessional errors, the outcome of the case would have been different. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) A reasonable probability is one "sufficient to undermine confidence in the outcome." (*Id*. at p. 218, quoting *Strickland*, *supra*, at pp. 693-694.)

A court need not assess the two factors of the inquiry in order, and if there is an inadequate showing on either factor, it need not be addressed. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 697.) Thus, if the record reveals that defendant suffered no prejudice, we may decide the issue of ineffective assistance of counsel on that basis alone. (*Ibid*.)

C. No Ineffective Assistance

Having determined that the instruction given to the jury regarding weapon use was not erroneous, we necessarily conclude that counsel did not provide ineffective assistance.

IX. Cruel and Unusual Punishment

A. Defendant's Argument

Defendant contends that the 139 years-to-life sentence imposed for the sex crimes in this case amounts to cruel and unusual punishment. Defendant points out that, other than a misdemeanor DUI conviction in 2006, defendant had no prior criminal or juvenile record, and there was evidence he was intoxicated during the crimes. Also, the crimes occurred during a single course of aberrant behavior with a single victim and a single intent.

B. Relevant Authority

In *Harmelin v. Michigan* (1991) 501 U.S. 957 (*Harmelin*), a majority of the Supreme Court determined that the Eighth Amendment does not guarantee proportionality of sentences. (*Harmelin*, at p. 965.) Justice Kennedy, joined by Justices O'Connor and Souter, concluded that the Eighth Amendment prohibits only sentences that are "'grossly disproportionate'" to the crime. (*Harmelin*, at p. 1001.) Even those justices in the *Harmelin* plurality who recognized a guarantee of proportionality review stressed that, """[o]utside the context of capital punishment, *successful* challenges to the proportionality of particular sentences [are] exceedingly rare""" because of the "relative lack of objective standards concerning terms of imprisonment . . . ." (*Ibid.*; see also *Lockyer v. Andrade* (2003) 538 U.S. 63, 77 (*Andrade*) ["The gross disproportionality principle reserves a constitutional violation for only the extraordinary case"].)

In *Ewing v. California* (2003) 538 U.S. 11 (*Ewing*), the lead opinion by Justice O'Connor, in which two justices joined her and two others concurred, confirmed that the "proportionality principles . . . distilled in Justice Kennedy's concurrence" in *Harmelin* guide application of the Eighth Amendment to challenges to recidivist sentencing. (*Ewing*, at pp. 23-24.) In *Ewing*, the appellant was sentenced to a term of 25 years to life pursuant to the three strikes law for shoplifting golf clubs worth approximately $1,200. He had suffered several prior theft-related convictions, as well as convictions for robbery, battery, burglary, possession of drug paraphernalia, unlawful possession of a firearm, and trespassing. (*Id*. at pp. 17-19.) In rejecting Ewing's cruel and unusual punishment claim, the Court explained that the Eighth Amendment contains a "'narrow proportionality principle'" applicable to noncapital sentences. (*Ewing*, at p. 20.) It does not require strict proportionality between crime and sentence, but only forbids extreme sentences that are grossly disproportionate to the crime. (*Id*. at p. 23.)

In *Andrade*, the appellant's two consecutive 25 years-to-life sentences, imposed for shoplifting videotapes valued at approximately $150, were upheld against an Eighth Amendment challenge. (*Andrade*, *supra*, 538 U.S.at pp. 66, 77.) The high court stated

that one governing legal principle emerges from Eighth Amendment jurisprudence as "'clearly established'" federal law: "A gross disproportionality principle is applicable to sentences for terms of years." (*Andrade*, at p. 72.) The court held that it was not an unreasonable application of this principle for the California Court of Appeal to affirm Andrade's sentence. (*Id*. at p. 77.)

This gross proportionality principle corresponds to the test used in analyzing whether a sentence is cruel or unusual under the California Constitution, as stated in *In re Lynch* (1972) 8 Cal.3d 410, 424 (*Lynch*) [holding punishment to be cruel or unusual if so disproportionate to the crime that it "shocks the conscience and offends fundamental notions of human dignity"].) In *Lynch*, the court set out three techniques for evaluating whether a sentence is cruel or unusual under California law. According to *Lynch*, it is useful to: (1) examine the "nature of the offense and/or the offender, with particular regard to the degree of danger both present to society" (*id*. at p. 425); (2) compare the challenged punishment with punishments prescribed for more serious offenses in the same jurisdiction (*id*. at p. 426); and (3) compare the challenged punishment with punishments prescribed for the same offense in other jurisdictions (*id*. at p. 427).

The usefulness of *Lynch*'s second and third techniques is questionable, however. The California Supreme Court has held in death penalty decisions subsequent to *Lynch* that "intercase" proportionality review is not required by the federal Constitution and "is not mandated under our state Constitution in order to ensure due process and equal protection, nor is it required in order to avoid the infliction of cruel or unusual punishment." (*People v. Crittenden* (1994) 9 Cal.4th 83, 156; accord, *People v. Barnett* (1998) 17 Cal.4th 1044, 1182; *People v. Bradford* (1997) 15 Cal.4th 1229, 1384.) The court has indicated that all that is required is "intracase" review, i.e., an evaluation of whether the sentence is "grossly disproportionate" to the offense. (*People v. Bradford*, at p. 1384.) The California Supreme Court has emphasized that the defendant must overcome a considerable burden in challenging a penalty as cruel or unusual. (*People v. Wingo* (1975) 14 Cal.3d 169, 174.)

C. No Cruel and/or Unusual Punishment

Under this gross disproportionality principle that must guide our analysis of defendant's challenge, we conclude that defendant's individual circumstances do not demonstrate that his punishment is cruel and/or unusual under the *Lynch* test or the federal test.

There is no denying the heinous nature of defendant's crimes upon K. As stated in *People v. Wutzke* (2002) 28 Cal.4th 923, 929-930, section 667.61 reflects the Legislature's view that defendants who commit sex crimes under certain circumstances must be subject to severe penalties. Defendant had time to reflect between each series of attacks upon K. and chose to commit 11 atrocious crimes against a single victim. Defendant cannot deny the vulnerability of the victim, a nearsighted woman whose glasses were taken away and who was made to strip naked in a lonely field at night. Defendant had undoubtedly gauged the degree of fear he had initially instilled in the victim and callously determined that she was an easy target for him. Upon completing his sex crimes, defendant cunningly tried to wash off all traces of his DNA from the victim by pouring water over her and attempting to clean her genital area as well as his own. He threatened her and her family numerous times and ensured that she feared he had copied her address. When the totality of the circumstances in this crime is considered, we cannot say that the punishment imposed on defendant is constitutionally infirm. (See, e.g., *People v. Bestelmeyer* (1985) 166 Cal.App.3d 520, 522-523, 531-532 [129 years for 25 sex-related offenses committed against single child victim not disproportionate].) "Punishment is not cruel or unusual merely because the Legislature may have chosen to permit a lesser punishment for another crime. Leniency as to one charge does not transform a reasonable punishment into one that is cruel or unusual." (*Id*. at pp. 530-531.) "When they enacted Penal Code section 667.6, subdivision (d) the Legislature chose to treat violent sex offense[s] and violent sex offenders differently than other types of offenses and offenders. In view of the outrageous nature of this type of offense and in view of the danger that these offenses pose to society we cannot say that

the imposition of consecutive sentences for multiple sex offenses shocks the conscience and offends fundamental notions of human dignity." (*Bestelmeyer*, *supra*, at p. 531.)

Defendant's is not the "'rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.'" (*Ewing*, *supra*, 538 U.S. at p. 30.) Under the circumstances of this case, his sentence is not an extreme one that is grossly disproportionate to the crime (*Harmelin*, *supra*, 501 U.S. at p. 1001) nor does it "shock[] the conscience or offend[] fundamental notions of human dignity" (*Lynch*, *supra*, 8 Cal.3d at p. 424). The sentence therefore does not run afoul of either the California Constitution or the Eighth Amendment strictures of the United States Constitution, and it does not constitute cruel and/or unusual punishment.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, P. J.

BOREN

We concur:

_____, J.

DOI TODD

_____, J.

CHAVEZ